83-1272

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ALEXANDER L. STEVAS,
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NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

ROBERT FRANK LEE,
Petitioner,

v.

CITY OF KNOXVILLE, TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether negligent conduct attributable to a municipality can form the basis of an award of damages under 42 U.S.C. § 1983 against the municipality.

2. Whether a municipality can be liable for damages under 42 U.S.C. § 1983 for failing to supervise, control, and train a police officer when the municipality knew of the officer's dangerous propensities and violent use of firearms.

3. Whether a municipality can be liable for damages under 42 U.S.C. § 1983 for a policy and custom of the municipality allowing police officers to arrest, jail, and set bond for citizens accused of a crime without judicial process or any appearance before a judicial officer.

LIST OF PARTIES

The only party to the proceeding in the court whose judgment is sought to be reviewed not listed in the caption is Sanford Lynn Stout, one of the original defendants against whom Robert Lee, the Petitioner, obtained a judgment in the District Court.

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v.

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PETITION FOR WRIT OF CERTIORARI TO
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APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE
AND THE ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES

The Petitioner, Robert Frank Lee, petitions for a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered October 31, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals, entered October 31, 1983, (Appendix A, infra, p. A-1) is unreported. The judgment of the District Court, entered May 10, 1982, (Appendix B, infra, p. B-1) is unreported. The order and memorandum of the District Court, entered June 21, 1982, (Appendix C, infra, p. C-1), granting the motion of the Respondent herein for judgment notwithstanding the verdict is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 31, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTES INVOLVED

42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

STATEMENT OF THE CASE

This case arises out of the shooting and subsequent arrest of Robert Lee by Sanford Stout, a Knoxville, Tennessee police officer, who at the time of the shooting was under investigation for a similar shooting that occurred two months earlier. On October 21, 1980, Robert Lee, accompanied by a friend, was driving home late at night in Knoxville, Tennessee. While Mr. Lee's automobile was stopped at a traffic light, Mr. Lee's friend became involved in an altercation with a pedestrian, which resulted in the pedestrian cutting Mr. Lee's friend with a knife. Mr. Lee and his friend drove away, proceeded around the block, and drove in front of the Trailways Bus Station on a city street. At that time, Officer Stout was standing in the middle of the street pointing his pistol at Mr. Lee's vehicle.

Officer Stout ordered the men out of the vehicle. Robert Lee stopped his automobile. Mr. Lee and his friend exited the car and placed their hands on the roof of the automobile as ordered. Officer Stout then fired his revolver hitting the windshield of the automobile. Bullet fragments from that shot struck Robert Lee's left wrist and right upper arm. Officer Stout said, "Lucky miss," and handcuffed Mr. Lee.

After being shot and handcuffed, Robert Lee was taken to a hospital and treated for his gunshot wounds. Thereafter, he was transported to the Knoxville city jail and incarcerated for four or five hours until his bond was posted. Officer Stout filled out a blank warrant charging Mr. Lee with assault and battery and alleging that Mr. Lee had thrown a beer bottle at him.

After filling out the warrant, Officer Stout followed what he described as the "standard procedure" of the Knoxville Police Department; that is, he did not take Mr. Lee before a Judge or Magistrate, nor did he swear to the affidavit in the warrant. The officer merely filled out the warrant and incarcerated Mr. Lee. Mr. Lee never saw a judicial officer, and he was not informed of the offense with which he was charged. In fact, no valid arrest warrant was ever obtained by the officer until the case came on for preliminary hearing four weeks later, at which time the General Sessions Judge dismissed the case for lack of probable cause.

At the time of the shooting and arrest, Officer Stout was in his Knoxville police uniform, and pursuant to the rules and regulations of the City of Knoxville

Police Department, he was working as an armed, night security guard at the Trailways Bus Station. The arrangements for Officer Stout's employment were with the authority and consent of the Knoxville Police Department. Officer Stout also was carrying a revolver issued to him by the police department.

Approximately two months prior to the shooting in this case, Officer Stout had discharged his revolver four times into an automobile in a congested civilian area under circumstances very similar to the shooting of Robert Lee. That shooting prompted an investigation by the internal investigation division of the Knoxville Police Department and resulted in the confiscation of Officer Stout's weapon. Under the standard operating procedures of the Knoxville Police Department, the revolver was returned to Officer Stout on

September 16, 1980, approximately one month after it had been confiscated and three weeks prior to the shooting of Robert Lee. Although there was no formal review of the investigation of the prior shooting until December of 1980, all of the statements from the witnesses had been taken and the actual investigation had been completed in August of 1980, shortly after the shooting. Ultimately, after Mr. Lee was shot, the first shooting was officially declared unjustified.

In October 1981, Robert Lee instituted a civil action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Tennessee against Officer Stout, the City of Knoxville, and Trailways Tennessee Lines, Inc. The basis of the action was the unlawful shooting of Mr. Lee by a Knoxville police officer who, at the time,

was working as a night security guard. The complaint also was predicated on the arrest and incarceration of Robert Lee by the police officer, pursuant to a City policy, without judicial process or any appearance before a judicial officer.

The case was tried before a jury, and at the close of Mr. Lee's proof, the City and Trailways moved for a directed verdict. That motion was denied, and at the close of all the proof, all three defendants moved for directed verdicts, which motion was denied. The jury then returned a verdict in favor of Mr. Lee against Officer Stout and the City of Knoxville and in favor of Trailways. Judgment was entered on the jury's verdict.

After Judgment was entered, Officer Stout and the City jointly filed a motion for judgment notwithstanding the verdict

or, in the alternative, for a new trial or remittitur. The District Court denied Officer Stout's motion but granted the City's motion for judgment notwithstanding the verdict and conditionally granted the City's motion for a new trial.

Robert Lee timely appealed the decision of the District Court granting judgment notwithstanding the verdict in favor of the City to the United States Court of Appeals for the Sixth Circuit. Officer Stout also cross-appealed. The Court of Appeals affirmed the judgment of the District Court in all respects.

This case is now before this Court on Mr. Lee's petition for writ of certiorari on the issue of a municipality's liability for damages under 42 U.S.C. § 1983.

REASONS FOR GRANTING THE WRIT

This case presents important questions of federal law which have not been, but should be settled by this Court. Since the decision in Monell v. Department of Social Services, 436 U.S. 658 (1978), the issue has arisen in the lower courts of municipal liability under 42 U.S.C. § 1983 for failure to properly train, discipline, or supervise police officers. This issue has not been addressed directly by this Court. In the absence of any authoritative guidelines, various standards have been articulated for determining the scope of municipal liability under 42 U.S.C. § 1983 for injuries resulting from inadequate training, discipline, or supervision of municipal personnel. No judicial consensus has resulted, and the issue has been further complicated by this Court's

suggestions, most recently in Parratt v. Taylor, 451 U.S. 527 (1981), that negligence will support a claim for relief under 42 U.S.C. § 1983.

In the case sub judice, the Sixth Circuit held that there was no failure to supervise "sufficient" to establish the City's liability. In so holding, the Court of Appeals, citing Hays v. Jefferson County, 668 F.2d 869 (6th Cir.), cert. denied, 103 S.Ct. 75 (1982), ruled that the municipality could be liable only if there was essentially a complete failure to train the police force, or training that was so reckless or grossly negligent that future police misconduct was almost inevitable. Furthermore, the Court of Appeals held that the evidence at best established simple negligence and fell short of establishing a governmental plan, policy, or custom of misuse of firearms.

(Appendix A, infra). Only a few days prior to the decision in this case, the Sixth Circuit had decided and filed an opinion in which it announced that "[l]iability based on negligence is sufficient, and the Parratt case undermines our decision in Hays." Brandon v. Allen, 719 F.2d 151, 154 (6th Cir. 1983).

Under Monell, it is clear that a municipality cannot be held liable under § 1983 solely on a respondeat superior theory. A municipality may, however, be sued for damages when "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers" or is "visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels."

Monnell, supra, 436 U.S. at 690-91. Monell unquestionably involved "official policy" as the moving force of the constitutional violation, and, as a result, that case did not explore or define the full contours and dimensions of the grounds on which municipal liability could be predicated. As emphasized in Monell by this Court, "[W]e have no occasion to address, and do not address, what the full contours of municipal liability under § 1983 may be." 436 U.S. at 695.

Little uniformity and considerable debate characterize those cases that have considered the liability of a municipality for inadequate training, discipline, or supervision of police officers. Some courts have indicated that a single incident of police violation of constitutional rights may be sufficient to suggest official acquiescence and render

the municipality liable under 42 U.S.C. § 1983. See Owens v. Haas, 601 F.2d 1242 (2d Cir.), cert. denied, 444 U.S. 980 (1979). Other decisions, although stating that citizens do not have to endure a pattern of past police misconduct before they can sue the municipality under § 1983, nevertheless require that the injury result from the complete lack of training or grossly inadequate training of a police force. Leite v. City of Providence, 463 F. Supp. 585 (D.R.I. 1978). See also Hays v. Jefferson County, supra. Still other decisions speak in terms of a municipality's continuing failure to remedy known unconstitutional conduct of its police officers as the type of informal policy or custom that is amenable to suit under § 1983. See Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981).

In light of the decision in Parratt v. Taylor, 451 U.S. 527 (1981), in which this Court expressed that negligence actions are not foreclosed under § 1983, it is highly questionable whether those cases that have required more than negligence to sustain a claim against a municipality under § 1983 have continuing validity.

This case squarely places the issue before this Court.

Nothing in Monell or in the language or history of § 1983 strictly limits municipal liability to intentional deprivations of constitutional rights. Monell was concerned, inter alia, with defining municipal liability so to exclude liability solely on a respondeat superior theory. Holding a municipality liable for its own negligence does not, however, transform § 1983 into a mechanism by which

respondeat superior liability can form the basis for a claim against the municipality. The principle of proximate cause will serve to ensure that there must be a direct causal or affirmative link between the actions of the municipality and the injury suffered.

This Court has interpreted 42 U.S.C. § 1983 broadly to effectuate its purpose of encouraging private parties to institute actions for violations of the constitutional rights as a means of fostering accountability and consciousness on the part of public officials and government entities for violations of personal liberties. See Owen v. City of Independence, 445 U.S. 622 (1980); Monell, supra. By clearly enunciating the standard of liability for municipalities, as urged by Petitioner, this Court can further this

purpose. As recognized by this Court in Owen v. City of Independence, supra,

> The central aim of the Civil Rights Act was to provide protection to those persons wronged by the "'[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'"...
>
> How "uniquely amiss" it would be, therefore, if the government itself -- "the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct" -- were permitted to disavow liability for the injury it has begotten.

445 U.S. at 650-51 (quoting Monroe v. Pape, 365 U.S. 167, 184 (1961), and Adickes v. Kress & Co., 398 U.S. 144, 190 (1970)).

Even if this Court is disinclined to grant certiorari in this case to consider whether negligence will support a claim of

municipal liability under 42 U.S.C. § 1983, this case presents a much needed opportunity to address and articulate an appropriate standard for municipal liability for inadequate training, supervision, and discipline of police officers. In particular, this case raises the issue whether a municipality's knowledge, actual or constructive, of an officer's prior misconduct and improper use of firearms likely to recur unless action is taken can constitute or establish a policy or custom within the meaning of Monell.

In this case, the City attempted to prove that the results of the police investigation of the first shooting were unknown to City officials at the time Robert Lee was shot by Officer Stout such that the City did not authorize, approve or knowingly acquiesce in the shooting in

this case. The proof actually showed, however, that the investigation of the first shooting was completed prior to the shooting of Robert Lee. Further, the proof showed that not only were no steps taken to discipline or supervise the officer prior to the shooting of Robert Lee but also that the officer's gun was returned to him. Under these circumstances, the Court of Appeals' conclusion that the City was at best simply negligent merits consideration by this Court. This conclusion allows the City to close its eyes to constitutional violations by its officers and invoke § 1983 as a shield from liability on the basis that the officer was adequately trained.

The ramifications of the decisions below are also far reaching because the District Court and Court of Appeals conclude that the standard procedures

followed by the Knoxville Police Department for jailing and charging Robert Lee cannot be ascribed to the City. Monell, in speaking of deprivations visited pursuant to governmental "custom", does not require that the custom originate with the municipality or that the municipality be the only entity to participate or follow the custom. Any such contrary reading of Monell is clearly too restrictive and reduces the important principles embodied in Monell to mere rhetoric.

When an individual has his liberties invaded and restrained at the whim of police officers, acting pursuant to municipal policy or custom, and without an independent determination of probable cause by a Magistrate, more than technical distinctions, such as who initially proposed or initiated the governmental

policy or custom, must be brought to bear to dispossess the individual of his claim against the municipality. The central and fundamental inquiry should always be whether a governmental policy or custom, in effect and being followed by the municipality, resulted in the violation of a citizens' constitutional rights. Since the District Court and Court of Appeals have placed an artifical and strained construction on what constitutes a governmental policy or custom, Petitioner submits this Court should grant the Writ prayed for to foreclose any doubt about the purpose and intention of municipal liability under 42 U.S.C. § 1983.

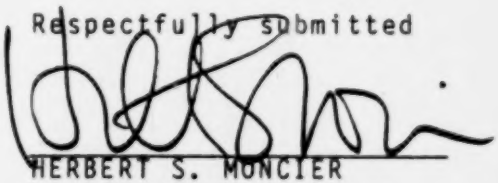
If municipal liability under 42 U.S.C. § 1983 is to have continuing validity and meaningful substance, the contours of that liability must be more clearly defined by this Court. Without

such guidance, abuse of power and inadequate redress of the abuse ultimately results, as vividly demonstrated by this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decisions below should be reviewed by this Court and the petition for writ of certiorari should be granted.

Respectfully submitted



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PROOF OF SERVICE

I, Herbert S. Moncier, attorney for Robert Frank Lee, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 30th day of January, 1984, I served copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States on Louis C. Hofferbert, Esq., City Law Director, City-County Building, 400 Main Avenue, Knoxville, Tennessee 37902, attorney for Respondent herein, by mailing copies of the same in duly addressed envelopes with postage prepaid.



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APPENDIX A

Nos. 82-5400/01

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT FRANK LEE,

Plaintiff-Appellant,
Cross-Appellee,

v. O R D E R

SANFORD LYNN STOUT,

Defendant-Appellee,
Cross-Appellant,

and

CITY OF KNOXVILLE, TENNESSEE,

Defendant-Appellee.
_____/

Before: KENNEDY and MARTIN, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

This case arises from an incident which occurred in downtown Knoxville, Tennessee. Lee was driving home late at night with a friend as a passenger. While

Lee's car was stopped at a traffic light, the passenger had words with a pedestrian, got out of the car to continue the argument, and was cut on the elbow by the pedestrian. Lee, with his passenger, drove a few blocks away and then circled back to again find the pedestrian. The pedestrian had by this time enlisted the aid of Stout, a uniformed Knoxville police officer who was working off-duty at the nearby Trailways bus station. Stout forced Lee's car to stop by stepping in front of the car, with his gun drawn. Stout ordered Lee and his friend to get out of the car and put their hands on top of it. They complied. Stout then fired his gun. The shot hit the windshield near Lee, and bullet fragments hit Lee in the wrist and upper arm. Stout said "lucky miss," and handcuffed Lee and his friend. Lee then

realized that he was wounded and was taken to a hospital and treated.

Stout testified that Lee had suddenly started to go back into the car, and that Stout had thought he was either going for a weapon or about to run the car over Stout. However, this testimony was contradicted by other witnesses.

Upon release from the hospital Lee was taken to jail. After a brief telephone conversation with a county judge, Stout filled out a warrant against Lee for assault and battery, left it to be signed later, and at the judge's direction set Lee's bond at $200 cash (the state minimum). Four or five hours later, Lee was released on bond. The warrant was never signed. The charge was dismissed at the preliminary hearing four weeks later.

Lee then brought this § 1983 action against Stout, the City of Knoxville, and Trailways. Included in the complaint were state law claims of false arrest, malicious prosecution, and assault and battery. The District Court dismissed the state claims, refusing to assert pendent jurisdiction. The action was tried to a jury which returned a verdict in favor of Lee against Stout and the City, and in favor of Trailways. The District Court then granted judgment notwithstanding the verdict in favor of the City. Lee appeals from the judgment n.o.v., claiming that the City is liable for inadequate supervision of Stout and for allowing Lee to be jailed without judicial process. Stout cross-appeals, claiming that evidence of a prior statement by Lee was erroneously included, and that dismissal

of the pendent claims was an abuse of discretion.

1. City's Liability for Inadequate Supervision

Lee first argues that the City may be held liable for Stout's acts because the City, which must authorize off-duty employment and which provided Stout with his uniform, gun, transportation, and authority, remained responsible for supervising Stout. However, Lee has not shown any failure to supervise sufficient to establish the City's liability even accepting that Stout was on duty when the incident occurred. This Court has held that where the constitutional violation is not alleged to be part of a pattern or policy "a municipality may be held liable only when there is essentially a complete failure to train the police force, or

training that is so reckless or grossly negligent that future police misconduct is almost inevitable." Hays v. Jefferson County, 668 F.2d 869, 874 (6th Cir.), cert. denied, 103 S.Ct. 75 (1982). The evidence in this case was that Stout was adequately trained.

Of only slight greater merit is Lee's argument that the City's failure to take Stout's gun away pending completion of internal investigation of an earlier reckless misuse of firearms charge against Stout constituted knowing acquiescence or implicit authorization of Stout's conduct. The evidence at best establishes simple negligence, however, and falls far short of establishing a governmental plan, policy, or custom of misuse of firearms. Monell v. Department of Social Services,

436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362 (1976).

2. City's Liability for Jailing Without Judicial Appearance

Lee claims that the City is liable for its policy of allowing officers to incarcerate citizens without any appearance before a judicial officer if the arrest takes place at night. It is true that when a warrantless arrest is made a determination of probable cause "must be made by a judicial officer either before or promptly after arrest." Baker v. McCollan, 443 U.S. 137, 143 (1979); Gerstein v. Pugh, 420 U.S. 103, 125 (1975). This determination is required before "any significant pretrial restraint of liberty," but "only for those suspects who suffer restraints on liberty other than the condition that they appear for

trial." Gerstein, 420 U.S. at 125 & n.26. We need not decide whether incarceration for four or five hours before a $200 bond is posted triggers this requirement, since there was a judicial determination of probable cause to hold Lee immediately after his arrest. Stout telephoned a county general sessions court judge and told him that Lee had attacked Stout with a tire iron. The county judge testified at trial that the purpose of the telephone call was as a substitute for a sworn affidavit, and that his decision to allow a warrant was made independently and not under Stout's control.

Lee's real complaint is with the procedure used by the judge to determine probable cause. Although an "informal procedure" may be used, Gerstein, 420 U.S. at 121, we need not decide whether the

procedures used in this case were too informal because those procedures cannot be ascribed to the City of Knoxville. Although Knoxville is responsible for Lee's incarceration, it has no control over the procedures used by county judges. It therefore had no unconstitutional policy or custom.

3. Evidence of Lee's Statement

Some time before trial in this case, Lee told a group of people in a bar that he though Stout's gun had been fired accidentally. He was overhead by an undercover narcotics officer who was working on an unrelated investigation that night. The undercover officer also captured Lee's statement on his tape recorder. At trial, Stout attempted to introduce that tape recording into evidence. Lee's counsel objected on three

grounds: irrelevancy, violation of Lee's privacy rights, and that the tape was too garbled to be intelligible. The District Court excluded the tape on the ground that it was obtained in violation of 25 U.S.C. § 2511. Stout then attempted to introduce the undercover officer's testimony concerning Lee's statement. The District Court also excluded this testimony.

The District Court did not err in excluding the officer's tstimony, since it was irrelevant. Lee's statement could not have been used as a prior inconsistent statement to impeach Lee because it was not inconsistent with Lee's testimony. In fact, it supported Lee's testimony. Before the undercover officer's evidence was offered, Lee himself had testified that he had told a group of people, which may or may not have included the officer, that he

thought Stout's gun had been fired accidentally. Lee also testified that he had no way of knowing why Stout fired his gun. Lee's statement was also not relevant to show that the gun was fired accidentally. If offered as a fact, it was not within the personal knowledge of the declarant under Fed. R. Evid. 602; and if offered as Lee's opinion it is neither "rationally based on the perception of the witness" nor "helpful to a clear understanding...of a fact in issue" as required by Fed. R. Evid. 701.

4. Pendent Jurisdiction

In the cross-appeal Stout claims that the District Court abused its discretion in refusing to assume pendent jurisdiction over Lee's state law claims of assault and battery, false arrest, and malicious prosecution. The District Court

dismissed the state claims before trial without giving any reasons except for saying "I don't deal with pendent jurisdiction," and "I don't assume pendent jurisdiction. I just can't do it."

It was certainly well within the District Court's power to assume pendent jurisdiction in this case. Lee's federal and state claims "derive from a common nucleus of operative fact" and "are such that he would ordinarily be expected to try them all in one judicial proceeding." United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

A federal court need not exercise pendent jurisdiction to the limit of its power, however. "It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in

considerations of judicial economy, convenience and fairness to litigants. . . . Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties . . . ." Gibbs, 383 U.S. at 276 (footnote omitted).

Lee's state claims appear to have been a particularly appropriate subject for pendent jurisdiction. Proof of the state law claims would not have necessitated any witnesses or evidence not needed to prove the federal law claims. The state law claims are straightforward tort law claims which provide the basis for the § 1983 action. This is not a case such as Coe v. Bogart, 519 F.2d 10, 13 (6th Cir. 1975), where the complexity of the state law involved was such that "a determination of the merits of that claim

should be more appropriately made by the state courts." Neither the parties nor the District Court have pointed out any reason that pendent jurisdiction would be inappropriate.

However, although the District Court may have abused its discretion in declining to assert pendent jurisdiction, we do not remand this action for what would be a separate trial of the state claims in federal court. The parties in a lawsuit have no right to pendent jurisdiction. Pendent jurisdiction is a discretionary doctrine grounded in considerations of fairness and judicial economy. Limitations on district courts' discretion to decline pendent jurisdiction arise solely from appeallate courts' supervisory powers. The purposes of pendent jurisdiction would clearly no

longer be served by a remand in this case. Judicial economy would not be achieved; both the state and federal claims have already been adjudicated in the trial courts.* For a federal court to retry state claims that have already been decided in a state trial court would interfere with comity between the state and federal systems. The slight

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*Lee brought his state claims in the Circuit Court for Knox County, Tennessee. Knox County Circuit Judge James M. Haynes dismissed Lee's action against all defendants, apparently on res judicata grounds, on November 3, 1982. A notice of appeal from that dismissal to the Tennessee Court of Appeals has been filed.

possibility of a double recovery, which would only materialize if the state appellate court reversed the trial court and the trial court then erroneously awarded damages which duplicated those already received, is not sufficient to justify requiring a trial in the federal court.

The judgment of the District Court is affirmed.

ENTERED BY ORDER OF THE COURT

_____
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE,
NORTHERN DIVISION

Civil Action File No. 3-81-536

ROBERT FRANK LEE	)	
	)	
vs.	)	JUDGMENT
	)	
ROBERT LYNN STOUT	)	
CITY OF KNOXVILLE, TENNESSEE	)	
TRAILWAYS TENNESSEE LINES, INC	)	

This action came on for trial before the Court and a jury, Honorable Robert L. Taylor, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Order and Adjudged that the plaintiff, Robert Frank Lee, recover of the defendants, Sanford Lynn Stout and City of Knoxville, Tennessee, the sum of Sixty-five Thousand and no/100 ($65,000.00) Dollars, with interest

thereon at the rate as provided by law, and his costs of action.

It is further ordered and adjudged that plaintiff, Robert Frank Lee, take nothing from the defendant, Trailways Tennessee Lines, Inc., that the action against it be dismissed on the merits, and that said defendant recover its costs of action.

Dated at Knoxville, Tennessee, this 8th day of May, 1982.

_____
Clerk of Court

By _____
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
TENNESSEE, NORTHERN DIVISION

ROBERT FRANK LEE	:	
	:	
v.		CIV. 3-81-536
	:	
SANFORD LYNN STOUT, CITY OF KNOXVILLE, TENNESSEE, TRAILWAYS TENNESSEE LINES, INC.	:	

ORDER

For the reasons stated in a memorandum opinion this day passed to the Clerk for filing, it is ORDERED that defendant City of Knoxville's motion for judgment notwithstanding the verdict be, and the same hereby is, granted. It is further ORDERED that defendant City of Knoxville's motion for a new trial be, and the same hereby is, conditionally granted. It is further ORDERED that defendant

No. 3-81-536 Lee v. Stout, et al

Stout's motion for judgment notwithstanding the verdict, or, in the alternative for a new trial or remittitur be, and the same hereby is, denied.

Enter: June 21, 1982

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

ROBERT FRANK LEE	:	
	:	
v.		CIV. 3-81-536
	:	
SANFORD LYNN STOUT, CITY OF KNOXVILLE, TENNESSEE, TRAILWAYS TENNESSEE LINES, INC.	:	

MEMORANDUM

Defendants have filed a motion for judgment notwithstanding the verdict, or, in the alternative for a new trial or remittitur. Although defendants have joined in the motion and raise many grounds which are applicable to both defendants, their respective liabilities are determined by different standards and, as explained below, result in opposite conclusions.

Defendants' motion for judgment notwithstanding the verdict is based on the ground that there was insufficient evidence to show that they violated any duty owed plaintiff that proximately caused plaintiff's injuries. As to defendant Stout, this motion has no merit. The jury's verdict is supported by substantial evidence and the motion for judgment notwithstanding the verdict is denied.

As to the defendant City of Knoxville, the motion for judgment notwithstanding the verdict must be granted since we are convinced after a careful review of the proof presented at trial that there is insufficient evidence to sustain the jury's verdict. Both at trial and in his brief in opposition to the City's motion, plaintiff seeks to hold

the City liable for defendant Stout's actions based on three theories. First, that the City's regulations permit its officers to act as private security guards and that this policy caused the violation of plaintiff's civil rights. We do not believe that this policy is sufficient to render the City liable since it exercised no supervisory authority over defendant Stout in his job as security guard at the Trailways station. Kasanda v. Tomasch, 530 F.Supp. 1346 (N.D. Ohio, 1982), citing, Monell v. Dept. of Social Services, 436 U.S. 658 (1978).

Second, plaintiff argues that the City had a policy, or acquiesced in a policy, of incarcerating persons without an appearance before a magistrate. The proof showed that at the time this incident occurred the Knox County General

Sessions Court judges allowed some persons to be incarcerated without an appearance before a judge. Bonds for minor offenses were set at some predetermined amount. Bonds for unusual offenses, as the one in this case, were set over the phone. The judges apparently used this procedure only at night when no judge was on duty. The proof also showed, and this is the critical point, that the Knox County General Sessions Court Judges are elected by the Knox County voters and are not part of the City government. We are thus unable to find that a policy or custom of the City caused the incident complained of. Plaintiff may not hold the City liable on this theory since the policy involved was not that of the City. See Monell v. Dept. of Social Services, supra.

Third, plaintiff contends that the City knowingly acquiesced and implicitly authorized defendant Stout's conduct by allowing him to work when another shooting incident involving him was under investigation. The proof showed that the other shooting incident occurred in August, 1980 and that the shooting involved in this case occurred on October 21, 1980. The proof showed further that the conclusions of the internal investigation were published in December, 1980. Under these circumstances we are of the opinion that the City cannot be held liable. In Hays v. Jefferson County, 668 F.2d 869 (6th Cir. 1982), the Court of Appeals held that a municipality may be held liable when it implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct. Since the

results of the police investigation were unknown to City officials when this incident occurred, we hold that the City did not authorize, approve or knowingly acquiesce in the shooting. The proof showed that defendant Stout had been trained in the proper police procedures, particularly the procedures relating to the use of his service revolver. This, therefore, is not a case where a municipality may be held liable for a failure to train the police force. Id. Since the evidence gainst the City is insufficient to sustain the jury's verdict, we grant the City's motion for judgment notwithstanding the verdict. For the same reasons, we conditionally grant the City's motion for a new trial. Fed.R.Civ.P. 50(c)(1).

Defendant Stout raises ten grounds in the motion for new trial, or in the alternative for remittitur, as follows:

(1-5) That the verdict is so excessive as to evince passion or prejudice, and that the verdict is speculative, contrary to the evidence, contrary to the instructions of the Court, contrary to the weight of the evidence and is not supported by the evidence. These grounds are without merit. Substantial evidence supports the finding of liability against defendant Stout.

(6) That the Court erred in failing to ask the voir dire questions submitted by defendants. The Court asked sufficient questions to determine the competency of the jurors. Furthermore, defendants did not object to the voir dire. This ground is denied.

(7-8) That the Court erred in refusing to allow the testimony of Rick Harmon to be presented to the jury and in threatening to hold defense counsel in contempt. The Court understood that defense counsel wished to introduce the tape that the Court had ruled was inadmissible. For this reason the Court excluded Harmon's testimony. These grounds are, therefore, denied.

(9) That the Court erred in refusing to assume pendent jurisdiction. There was no error in declining pendent jurisdiction. Furthermore, defendant did not ask the Court to assume pendent jurisdiction.

(10) That the Court erred in allowing the admission of the internal security report involving the prior shooting incident. In the opinion of the

Court, the report was both competent and relevant. This ground is, therefore, denied.

For these reasons, it is ORDERED that defendant City of Knoxville's motion for judgment notwithstanding the verdict be, and the same hereby is, granted. It is further ORDERED that defendant City of Knoxville's motion for a new trial be, and the same hereby is, conditionally granted. It is further ORDERED that defendant Stout's motion for judgment notwithstanding the verdict, or, in the alternative for a new trial or remittitur be, and the same hereby is, denied.

Order Accordingly.

United States District Judge

Office - Supreme Court, U.S.
FILED
MAR 30 1984
ALEXANDER L. STEVAS,
CLERK

NO. 83-1272

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

ROBERT FRANK LEE,
Petitioner,

v.

CITY OF KNOXVILLE, TENNESSEE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Louis Hofferbert
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QUESTIONS PRESENTED

1. WHETHER A SINGLE ISOLATED INCIDENT OF POSSIBLE NEGLIGENCE ON THE PART OF A MUNICIPALITY IS SUFFICIENT TO ESTABLISH A POLICY, PRACTICE, OR CUSTOM ON THE PART OF SAID MUNICIPALITY OF FAILURE TO TRAIN, SUPERVISE, AND/OR CONTROL ITS POLICE OFFICERS THUS GIVING RISE TO MUNICIPAL LIABILITY BASED UPON 42 U.S.C. SECTION 1983.

2. WHETHER A MUNICIPALITY CAN BE LIABLE FOR DAMAGES UNDER 42 U.S.C. SECTION 1983 FOR A POLICY AND CUSTOM ESTAB-

LISHED AND MAINTAINED BY COUNTY OFFICIALS YET FOLLOWED BY MUNICIPAL POLICE OFFICERS.

LIST OF PARTIES

Pursuant to Supreme Court Rule 34.2, the Respondent deems the List of Parties presented by the Petitioner adequate and respectfully relies thereon.

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OPINIONS BELOW

Pursuant to Supreme Court Rule 34.2, the Respondent deems the presentation by the Petitioner of the Opinions and Judgments delivered in the Courts below adequate and respectfully relies thereon. Additionally, throughout this Brief in Opposition to Petition for Writ of Certiorari, references to the Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit shall be noted herein as the Petitioner's "Brief." The opinions below have been reproduced in the Petitioner's "Brief," pages A-1 through C-11 and the Respondent respectfully relies thereon.

JURISDICTION

Pursuant to Supreme Court Rule 34.2, the Respondent deems the jurisdictional statement presented by the Petitioner adequate and respectfully relies thereon.

STATUTES INVOLVED

Pursuant to Supreme Court Rule 34.2, the respondent deems the presentation by the Petitioner of the Statutes involved in this case adequate and respectfully relies thereon.

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 34.2, the Respondent deems the Statement of the Case presented by the Petitioner adequate and respectfully relies thereon except for the following:

1. It is important to note in the case sub judice persons or entities which were not parties to the Petitioner's lawsuit. No policy making official of the City of Knoxville was a party to this lawsuit and no policy making official of the City of Knoxville testified in this lawsuit. The only

trace of "supervisory" testimony or evidence in this case is from the testimony of City of Knoxville Internal Investigation Unit Investigator David Michael Adkins. Also, with regard to the issue of the incarceration procedures followed in this case, neither Knox County nor the Knox County Judges responsible for formulating the policy and procedures were made parties to this lawsuit.

2. The Statement of the Case presented by the Petitioner contains numerous

statements of fact which are, at the very least, uncertain from the record herein. For the sake of argument only, the Respondent will accept the Statement of the Case presented by the Petitioner. The Respondent will then conclusively demonstrate that well established precedents supplied by this Court preclude any need for review in this case.

REASONS FOR NOT GRANTING THE WRIT

Contrary to the assertions of the Petitioner, this case involves issues that have been well settled by this Court and followed by all of the Circuit Courts of Appeal. The fundamental principle which governs the disposition of this case is whether the actions of the City of Knoxville "alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by (the City's) officers," or "is visited pursuant to governmental 'custom' even

though such custom has not received formal approval through the (City's) official decision making channels." Monell v. New York City Department of Social Services, 436 U.S. 658, 690-91 (1978). Not only does the Petitioner agree that this is the guiding principle herein (see Petitioner's "Brief," pages 13, 22) but all of the Circuit Courts of Appeal agree as well. Cloutier v. Town of Epping, 714 F. 2d 1184, 1191 (1st Cir. 1983); Rookard v. Health and Hospitals Corporation, 710 F. 2d 41, 45 (2nd Cir. 1983); Czurlanis v. Albanese, 721 F. 2d 98, 108 (3rd Cir. 1983); Wellington v. Daniels, 717 F. 2d 932, 935 (4th Cir. 1983);

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For the sake of argument, we will assume that the "Statement of the Case" articulated by the Petitioner in his "Brief," pages 4-10, is correct. However, the record and transcript of evidence in this case, as the Sixth Circuit Court of Appeals stated (see Petitioner's "Brief" page A-6), "at best establishes simple negligence" on the part of the City of Knoxville with regard to the issue of supervision. The Petitioner has framed the issue in this case in terms of whether simple negligence by the City in the supervision of a police officer can support a claim for relief under 42 U.S.C. Section 1983 <u>against the City</u>.

This is far too simplistic and merely serves to blur the crucial distinction between the liability of a municipality for negligent supervision versus the liability of an individual supervisor for negligent supervision. The issue in the case sub judice can be correctly articulated in light of the above-quoted language from the landmark Monell case in terms of:

> Whether a single isolated incident of possible negligence on the part of a municipality is sufficient to establish a policy, practice or custom on the part of said municipality of failure to train, supervise, and/or control its police officers thus giving rise to municipal liability based upon 42 U.S.C. Section 1983.

The record in this case is far from clear on the issue of whether the City's failure to complete the investigation into the prior shooting involving Officer Stout prior to the incident which is the subject of this lawsuit constituted negligence. For the sake of argument, we will assume that the City may have been negligent. But as the Sixth Circuit noted, this "falls far short of establishing a governmental plan, policy or custom of misuse of firearms." (See Petitioner's "Brief," page A-6).

As mentioned above, pursuant to 42 U.S.C. Section 1983, there is a crucial distinction between the liability of

a municipality for negligent supervision versus the liability of a supervisor for negligent supervision. The Petitioner puts great weight on this Court's decision in Parratt v. Taylor, 451 U.S. 527 (1981). Parratt involves the situation where prison officials misplaced an inmate's hobby materials. The inmate instituted an action against the Warden and Hobby Manager pursuant to 42 U.S.C. Section 1983 for their negligence in misplacing the hobby materials. Id. at 530. The inmate claimed that he had been deprived of his property without due process of law. Id. at 531. The lower Courts held that the inmate could recover pursuant to 42 U.S.C. Section 1983 be-

cause the evidence established that there had been a "negligent deprivation" that could not be allowed without redress. Id. at 531. This Court reversed, implying at the outset (in dicta) that 42 U.S.C. Section 1983 did not have a scienter requirement. Rather, the Court stated:

> "Accordingly, in any Section 1983 action the initial inquiry must focus on whether the two essential elements to a Section 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." Id. at 535.

The Court did not ultimately resolve Parratt on the negligence versus intentional deprivation issue. Instead, the Court reasoned that "due process" was available to the inmate through the State of Nebraska and that the inmate should have followed State procedures in seeking redress. Id. at 543. Thus, there was no "deprivation of property without due process."

The importance of Parratt v. Taylor, supra, in the case sub judice is limited since Parratt did not involve the liability of a governmental entity. The focus of the inquiry in 42 U.S.C. Section 1983 cases involving municipalities is,

pursuant to Monell v. New York City Department of Social Services, 436 U.S. 658 (1978), whether the municipality's policy, practice, or custom caused a deprivation of an individual's rights as secured by the Federal Constitution or statute. Parratt teaches us that scienter is not relevant in determining whether a "deprivation" has occurred. But, Parratt must be read consistently with Monell. It is irrelevant whether a municipality acts "intentionally" or "negligently" in the formulation of its policies, practices, or customs. The issue is (1) whether a policy, practice or custom exists that

(2) caused a deprivation of an individual's Federal rights.

In isolated incidents of negligence on the part of a police officer or his/her supervisor, it is certainly conceivable that a deprivation of an individual's Federal rights could occur. But does that same isolated incident of negligence necessarily establish a policy, practice, or custom? The answer is certainly not. In Adickes v. Kress & Co., 398 U.S. 144, 167 (1970), this Court noted that custom denotes "persistent and widespread... practices." Common sense dictates that, at the very least, a pattern of negligent incidents emerges in

order to establish the requisite policy, practice, or custom.

On the other hand, some Courts have gone so far as to hold that an isolated incident of gross negligence may be sufficient to establish the requisite policy, practice or custom. Owens v. Haas, 601 F. 2d 1242, 1247 (2nd Cir. 1979). In Hays v. Jefferson County, 668 F. 2d 869 (6th Cir. 1982) cert denied 103 S. Ct. 75, the Court analyzed the liability of the governmental entity and the supervisor together in holding that gross negligence was required in order to hold either the governmental entity or the supervisor liable for failure to

train, control, or supervise its police officers. Id. at 874. Parratt v. Taylor, 451 U.S. 527 (1981) may have overruled Hays with regard to the liability of an individual supervisor but Parratt certainly does not overrule Hays with regard to the liability of the governmental entity. Pursuant to Hays, an isolated incident of simple negligence is insufficient to establish the requisite policy, practice or custom. However, gross negligence may be sufficient. Upon a careful consideration of Monell, Parratt, and Hays, it becomes obvious that the Petitioner has greatly misplaced his emphasis on the recent case of

Brandon v. Allen, 719 F. 2d 151 (6th Cir. 1983). Brandon deals solely with the liability of an individual supervisor and never addresses the crucial issue in municipal liability cases (i.e. does a policy, practice, or custom exist, etc.). Thus, Brandon is inapposite.

Lower Courts which have addressed the specific issue raised in the case sub judice are in accord with the analysis herein. In Wellington v. Daniels, 717 F. 2d 932 (4th Cir. 1983), the Court dealt with an isolated incident of possible negligence of a supervisor and the municipality, and held that insufficient to predicate liability upon the municipality:

"Generally, a failure to supervise gives rise to Section 1983 liability, however, only in those situations in which there is a history of widespread abuse. Only then may knowledge be imputed to the supervisory personnel.

(Citations omitted) A single act or isolated incidents are normally insufficient to establish supervisory inaction upon which to predicate Section 1983 liability.

(Citations omitted) Cf. Owens v. Haas, 601 F. 2d at 1247 (even an individual act of brutality by a county employee may be the basis for municipal liability where it arises from a municipal policy of inadequate training "so grossly negligent as to constitue 'deliberate indifference.'")

Once it has, indeed, been shown that there is a policy established and maintained by the City, the City is liable for any deprivation of constitutional right caused by conduct pursuant to that policy. The causal link may be direct, as in Monell, where the policy commands the injury of which the plaintiff complains. Or the causal link may be supplied by

tort principle that holds a person liable for the natural consequences of his actions. However, the initial inquiry is the existence of the policy. That inquiry is a complex one in a case such as this where the City's policy has not been articulated by but is alleged to be reflected in the omissions of the Chief of Police." (Footnote omitted)

Id. at 936.

"Although Chief Austin testified that he knew that the use of Kellite flashlights had caused serious and sometimes fatal injuries in other jurisdictions, and that members of his force sometimes used the Kellite flashlight as a weapon, he was not aware of any problems associated with prior use of the Kellite flashlight by members of the Newport News police force. He so testified, and no other evidence on the subject was adduced. Indeed, Gravelle could point to only the single incident during which the ward of the state was injured on which to predicate the Police Chief's supervisory and the City's municipal liability.

> Even in the context of a j.n.o.v. in the defendants' favor, in which all the evidence must be viewed favorably to Gravelle, (citations omitted), the record evidence did not support the jury's verdict. Therefore, the district court appropriately granted the j.n.o.v. There simply was not sufficient evidence to support a finding of City policy to allow use of a dangerous instrumentality, or any encouragement by Chief Austin of such use." (Footnote omitted) (Emphasis added)
>
> Id. at 937.

The requirement of a "pattern" or "history" of negligence is supported by other cases as well. See Trotter v. City of Chicago, 573 F. Supp. 1269 (N.D. Ill. 1983); McQuirter v. City of Atlanta, 572 F. Supp. 1401, 1420 (N.D. Ga. 1983); Overbay v. Lilliman, 572 F. Supp. 174,

177 (W.D. Mo. 1983). See also Hopper v. Hayes, 573 F. Supp. 1368 (Idaho 1983); Ladnier v. Murray, 572 F. Supp. 544 (Maryland 1983); Elam v. Montgomery County, 573 F. Supp. 797 (S.D. Ohio 1983).

It is crucial to note that, in the case sub judice, no supervisory officials of the City of Knoxville were made parties to the Petitioner's lawsuit. The only evidence of "supervisory" negligence must be deciphered from the testimony of David Michael Adkins, an investigator with the Internal Investigation Unit (IIU) of the City of Knoxville Police Department.

Whether the record supports the assertion that the IIU was negligent in failing to complete more quickly the investigation into the prior shooting in which Officer Stout was involved is certainly debatable. However, it is not subject to dispute that this was only an isolated incident. There is not even a scintilla of proof that a policy, practice, or custom existed within the City of Knoxville Police Department of failure to train, control, or supervise its police officers.

The applicable law regarding the supervisory issue is crystal clear. The only purpose of granting review in

this case would be to simply determine whether or not the record establishes a policy, practice, or custom on the part of the City of Knoxville of failing to train, supervise and/or control its police officers. The Sixth Circuit Court of Appeals has already performed such a review and has found that the evidence "falls far short of establishing a governmental plan, policy, or custom of misuse of firearms." Petitioner's "Brief," page A-6.

The second issue raised by the Petitioner involves <u>whether a municipality can be held liable for damages under 42 U.S.C. Section 1983 for a policy</u>

and custom established and maintained by Knox County officials yet followed by City of Knoxville police officers. The evidence shows that Knox County Judges instituted and enforced a policy of setting a standard bond for certain misdemeanor offenses, and in unusual cases or felony cases, a police officer would talk to the Judge over the phone to determine whether probable cause existed and the amount of bond required. This policy was utilized only at night when the Judge was not available since the Judge could not be awake twenty-four hours per day. The policy was designed to allow the person incarcerated the

quickest possible opportunity to post bond and be released from incarceration. Neither Knox County nor the Judges serving Knox County were made parties to this lawsuit. The principles enunciated in Monell v. New York City Department of Social Services, 436 U.S. 658 (1978) are clear. As the Sixth Circuit Court of Appeals noted, "Although Knoxville is responsible for Lee's incarceration, it has no control over the procedures used by county judges. It therefore had no unconstitutional policy or custom." Petitoner's "Brief," page A-9.

The City of Knoxville had absolutely no control over this method of

Knox County Judges which was used to comply with the Gerstein v. Pugh, 420 U.S. 103 (1975) requirement. Thus, the Petitioner's argument fails at the outset: no policy, practice or custom existed that is attributable to the City of Knoxville with regard to the procedures utilized after the Petitioner was incarcerated.

Notwithstanding the Petitioner's liberal construction of the evidence in this case, but for the sake of argument accepting that construction as valid, the applicable case law interpreting 42 U.S.C. Section 1983 is clear that the Petitioner has simply failed to

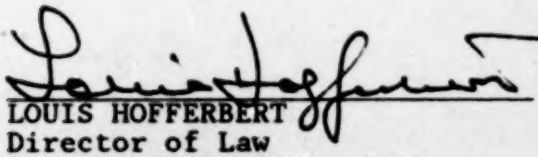
prove his case against the City of Knoxville. A single isolated incident of possible negligence on the part of a municipality is insufficient to establish a policy, practice, or custom attributable to said municipality. Not only is this the fundamental holding of Monell v. New York City Department of Social Services, supra, but, there is no case law which exists to the contrary. Likewise, the policy and practice of one governmental entity (Knox County and its Judges) cannot be imputed to another governmental entity (City of Knoxville). Granting the Petitioner's Writ of Certiorari would require this Court to repeat well established precedents which

the lower Courts have heretofore been correctly following. This is simply not a proper case for granting review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

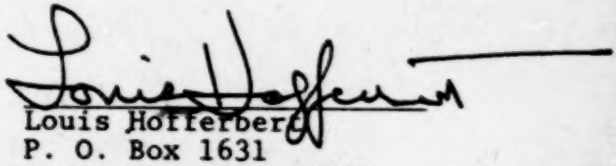


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PROOF OF SERVICE

I, Louis Hofferbert, Attorney for the City of Knoxville, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 30th day of March, 1984, I served copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit on Herbert S. Moncier, 1832 Plaza Tower, Knoxville, Tennessee, 37929, attorney

for the Petitioner herein, by mailing copies of the same in duly addressed envelopes with postage prepaid.



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